NO. 80-1242

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MISSOURI PACIFIC RAILROAD COMPANY,
*Petitioner*

v.

LOY D. ALCORN,
*Respondent*

**On Appeal From The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas**

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BEN G. SEWELL
900 Capital National Bank Bldg.
Houston, Texas 77002
(713) 652-8700

*Of Counsel:*

GORDON A. HOLLOWAY
CLAUDE R. TREECE
SEWELL & RIGGS
900 Capital National Bank Bldg.
Houston, Texas 77002
(713) 652-8700

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

## TABLE OF CONTENTS


| | Page |
|---|---|
| I. COURSE AND SCOPE OF EMPLOYMENT ..... | 1 |
| II. FAILURE TO DISCIPLINE ..... | 8 |
| CERTIFICATE OF SERVICE ..... | 10 |


## LIST OF AUTHORITIES

CASES


| | Page |
|---|---|
| Atlantic Coastline R.R. v. Southwell, 275 U.S. 64 (1927) | 9 |
| Baker v. Baltimore & Ohio R.R., 502 F.2d 638 (6th Cir. 1974) ..... | 3, 4, 7 |
| Baker v. Chicago, B. & Q. R.R., 327 Mo. 986, 39 N.W.2d 535 (1931) ..... | 5 |
| Blunk v. Achison, T. & S.F. Ry., 97 Cal. App. 2d 229, 217 P.2d 494, 497 (1950) ..... | 7 |
| Bocian v. Union Pacific R.R., 137 Neb. 318, 289 N.W. 372 (1939) ..... | 5 |
| Brooks v. Washington Terminal Company, 593 F.2d 1285, 1289-90 (D.C. Cir., *cert. denied*, 442 U.S. 910 (1979) .. | 8 |
| Claris v. Oregon Shortline R.R., 51 P.2d 217 (Ida.), *cert. denied*, 297 U.S. 714 (1935) ..... | 6 |
| Copeland v. St. Louis-San Francisco Ry., 291 F.2d 119, 121 (10th Cir. 1961) ..... | 7 |
| Cuddy v. Western Maryland Ry., 229 F.Supp. 443, 445 (Md. P.A. 1963), *aff'd per curiam*, 332 F.2d 371 (3d Cir. 1964) ..... | 8 |
| Davis v. Green, 260 U.S. 349, 351 (1922) ..... | 2, 3, 6, 7 |
| Descoteau v. Boston & Maine R.R., 140 A.2d 579 (N.H. 1958) ..... | 8 |
| Galveston, H. & S.A. Ry. v. Currie, 100 Tex. 136, 96 S.W. 1073 (1906) ..... | 6 |
| Goupiel v. Grand Trunk Ry., 96 Vt. 191, 118 A. 586 (1922) | 6 |
| Harrison v. Missouri Pacific R.R., 372 U.S. 248 (1963) ... | 4, 5 |
| Hoyt v. Thompson, 174 F.2d 284, 285 (7th Cir. 1949) ... | 7 |
| Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 172, n.8 (2d Cir. 1968) ..... | 7 |
| Kutz v. Terminal R.R. Association, 367 S.W.2d 55 (Mo. App. 1963) ..... | 6 |
| Lillie v. Thompson, 332 U.S. 459 (1947) ..... | 4, 5 |

CASES


| | Page |
|---|---|
| Mileski v. Long Island R.R., 499 F.2d 1169 (2d Cir. 1974) | 7 |
| North Carolina R.R. v. Zachary, 232 U.S. 248 (1914) .... | 4 |
| Osment v. Pitcairn, 349 Mo. 137, 159 S.W.2d 666, 668 (1941), *cert. denied*, 317 U.S. 587 (1942) and 320 U.S. 792 (1943) ..... | 7 |
| Sheaf v. Minneapolis, St. P. & S.S.M. R.R., 162 F.2d 110 (8th Cir. 1947) ..... | 6, 7 |
| Sinkler v. Missouri Pacific Railroad Company, 356 U.S. 326 (1958) ..... | 2, 3 |
| Slaughter v. Atlantic Coastline R.R., 302 F.2d 912 (D.C. Cir. 1962) ..... | 5 |
| Sowards v. Chesapeake & O. Ry., 580 F.2d 713, 715 (4th Cir. 1978) ..... | 7 |


MISCELLANEOUS


| | |
|---|---|
| 8 A.L.R. 3rd 442, 444-45, 447-450 (1966) ..... | 5 |

NO. 80-1242

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MISSOURI PACIFIC RAILROAD COMPANY,
*Petitioner*

v.

LOY D. ALCORN,
*Respondent*

**On Appeal From The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas**

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I. COURSE AND SCOPE OF EMPLOYMENT

Respondent commences his legal argument with a recitation of well-worn truisms concerning the reviewability of fact findings in FELA cases. Those principles and the cases cited by Respondent are simply not pertinent. This case does not involve hotly disputed fact questions—indeed, there is virtually no dispute as to the conduct of the various railroad employees involved in this incident.

Petitioner[1] simply contends that, given the undisputed fact that this accident involved nothing more than the perpetration of a practical joke, there was as a matter of law no evidence that the employees were acting within the course and scope of their employment. The playing of a practical joke cannot conceivably be in furtherance of the railroad's business and thus cannot fall within the standard for course and scope of employment in FELA cases laid down by this Court in *Davis v. Green,* 260 U.S. 349, 351 (1922),[2] and followed in numerous subsequent cases. The continuing validity of the *Davis v. Green* standard is in fact thoroughly documented in one of the principal cases relied upon by Respondent. *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326 (1958), was not a horseplay case, but instead involved the question whether the plaintiff, in performing certain switching operations, was an "agent" of the defendant railroad. Within the course of less than two pages of its opinion, the *Sinkler* Court used phraseology virtually identical to the *Davis v. Green* standard no less than eight times: "engaged in the enterprise," "engaged in the common endeavor," "furtherance of the enterprise," "in the common pursuit," "further the task of the respondent's enterprise," "part of the respondent's total enterprise," "engaged in his regular work on the respondent's car," "furthering the operational activities of respondent," and "performing . . . operational activities of his employer."

---

1. A listing of all of Petitioner Missouri Pacific Railroad Company's parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates is contained in the Petition for Writ of Certiorari at ii, n.1.

2. It is interesting to note that nowhere in his brief does Respondent even mention *Davis v. Green,* nor does he ever attempt to distinguish it or its considerable progeny.

356 U.S. at 330-32. In short, conduct "in furtherance of the railroad's business" has been the touchstone for FELA liability since the decision in *Davis v. Green* and, as indicated by the above language in *Sinkler* and by the numerous cases cited by Petitioner in its Petition for Writ of Certiorari (at 5-9), continues to be the appropriate standard.

Respondent cites *Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638 (6th Cir. 1974) as "portray[ing] the current attitude of appellate courts to broaden the scope of employer liability." Respondent's Brief at 2. Respondent goes on to assert that the *Baker* court "argued" that the "better" course and scope rule in FELA cases would be "to make the railroad liable 'for all negligent acts by employees which occur during the hours of the employee's working day on the employer's premises.' " Respondent's Brief at 2, n.1. This assertion on the part of Respondent stretches *Baker* far beyond the language actually used by the Sixth Circuit. Instead, the *Baker* court merely suggested, in a footnote, that a more liberal rule in FELA cases *might* extend liability to all acts committed during working hours. 502 F.2d at 642, n.3. The court twice pointed out in that same footnote that the question as to the course and scope of employment test had not been preserved for appeal and was not before the court. *Id.* In addition, the *Baker* court expressly noted that its case did not involve an employee's "sportive" act and deferred to the rulings of several cases cited by Petitioner as setting forth the controlling rule in such cases. 502 F.2d at 641-42, n.2. In short, the comment by the *Baker* court in the margin of its opinion concerning the possible liberality of the course and scope test must be taken as rank dictum in an opinion involving a factual context

completely different from that presented in the case at bar and so distinguished by the *Baker* court itself.[3]

For the first time in the course of this litigation, Respondent introduces the argument that the railroad should be held liable for acts of intentional or criminal misconduct, even if those acts do not occur in furtherance of the railroad's enterprise. Respondent's Brief at 5, n.2. The first case cited by Respondent, *Lillie v. Thompson*, 332 U.S. 459 (1947), is not a course and scope case at all, as it involved injuries to the plaintiff committed by an assailant who was not an employee of the railroad. The question in *Lillie* simply concerned the duty of the railroad to protect a 22-year old female employee who worked the graveyard shift as a telegraph operator in an isolated part of the railroad's Memphis yard. A similar situation was presented in the second case cited by Respondent, *Harrison v. Missouri Pacific R.R.*, 372 U.S. 248 (1963). Although the assault in *Harrison* was com-

---

3. Respondent's misplaced reliance on *Baker* is further documented by that court's observation that the scope of employment includes both actual service and "those things necessarily incident thereto." *Id.* at 642. The act complained of in *Baker* was a co-employee's "removing his coat from the candy machine while forgetting about the pistol, *in preparation for inspecting a railroad car.*" *Id.* at 643 (emphasis added). Thus, the *Baker* court simply held that when a co-employee puts on his jacket in preparation for inspecting a railroad car pursuant to orders from his supervisor, he is performing an act "necessarily incident" to actual service. It is difficult to imagine how fireman Calloway's act in the case at bar of placing torpedoes on the rail for the purpose of playing a practical joke was "necessarily incident" to his actual service. A similar analysis applies to another case cited by Respondent, *North Carolina R.R. v. Zachary*, 232 U.S. 248 (1914), wherein the Court noted that there was "nothing to indicate" that the employee's act "was inconsistent with his duty to his employer." *Id.* at 260. The employee's act in *Zachary* merely consisted of briefly visiting his boarding house shortly before departing on his run, having just prepared his engine for that purpose. Moreover, he was still within the limits of the railroad yard at the time of the accident.

mitted by a co-employee, the railroad's liability did not turn on the conduct of the assailant, but was instead based on the railroad's duty to protect against such conduct in light of prior threatening behavior.[4] The third case cited by Respondent, *Slaughter v. Atlantic Coastline R.R.*, 302 F.2d 912 (D.C. Cir. 1962), stands for precisely the opposite principle from that for which it is cited. In reversing the district court's dismissal for failure to state a claim, the Court of Appeals held that the act of the railroad's inspector in causing the plaintiff to be arrested could be a basis for liability under the FELA, but went on to state that "[o]f course, no recovery may be had *unless the tort was 'committed in the course of the discharge of* [*the inspector's*] *duties and in the furtherance of the work of the employer's business.'*" *Id.* at 916 (emphasis added).[5] Thus, *Slaughter* merely con-

4. While *Lillie* and *Harrison* thus shed absolutely no light on the course and scope question, they do have certain implications regarding the failure to discipline issue in this case. Both cases subjected the railroad to liability because of the railroad's actual knowledge of the threatening situation. In *Lillie*, the railroad "was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury." 332 U.S. at 461-62. In *Harrison*, the railroad's roadmaster had warned the plaintiff of the assailant's reputation as a troublemaker and had received subsequent complaints from the plaintiff regarding the assailant's misconduct. 372 U.S. at 249. In short, both cases involved actual knowledge by railroad officers of the dangerous conditions, while Respondent in the case at bar fell far short of establishing any such actual knowledge. *See* Petition for Certiorari at 4, 10-11, and *infra* at 8-10.

5. A similar ruling would obtain in cases of "excessive discipline" in which an overwrought supervisor carries his discipline of an employee to the point of actual assault. *See, e.g., Bocian v. Union Pacific R.R.*, 137 Neb. 318, 289 N.W. 372 (1939); *Baker v. Chicago, B. & Q. R.R.*, 327 Mo. 986, 39 N.W.2d 535 (1931). *See generally* Annot., 8 A.L.R. 3rd 442, 444-45, 447-450 (1966). This Annotation also discusses the rule of so-called "direct negligence," subjecting the railroad to liability for injuries resulting from its hiring a danger-

stitutes additional authority for the continuing viability of the rule in *Davis v. Green.*

Respondent next attempts to hinge liability on the failure of the conductor and engineer on the Amoco switcher to prevent fireman Calloway from carrying out his practical joke. Although the evidence was disputed as to whether or not the engineer and conductor knew of fireman Calloway's actions, it does not matter which version of the facts is believed. If they were not aware of his conduct, their failure to prevent the joke obviously cannot have been negligence. On the other hand, if the engineer and conductor were aware that Calloway had placed the torpedoes on the rail, they had to know that he had no legitimate railroad purpose for doing so. Their failure to stop Calloway would thus have amounted to acquiescence and implicit participation in his practical joke. Respondent's attempt to bootstrap an argument based on this failure of the "supervisory" crew members ignores the holdings of no liability in many FELA cases involving horseplay that *did* occur in the presence of supervisory personnel. *See, e.g., Sheaf v. Minneapolis, St. P. & S.S.M. R.R.,* 162 F.2d 110 (8th Cir. 1947) (engineer present); *Kutz v. Terminal R.R. Association,* 367 S.W.2d 55 (Mo. App. 1963) (foreman of crew present); *Goupiel v. Grand Trunk Ry.,* 96 Vt. 191, 118 A. 586 (1922) (engineer present); *Galveston, H. & S.A. Ry. v. Currie,* 100 Tex. 136, 96 S.W. 1073 (1906) (supervisor of roundhouse present).[6]

---

ous employee. *Id.* at 446, 454-61. The case at bar contains no allegations or evidence to support liability on a "direct negligence" theory.

6. Both of the cases cited by Respondent in this connection are distinguishable. *Claris v. Oregon Shortline R.R.,* 51 P.2d 217 (Ida.), *cert. denied,* 297 U.S. 714 (1935), did not involve a failure to pre-

In sum, Respondent's brief in no way diminishes the reasons advanced by Petitioner for granting the writ in this case. Indeed, the various contentions raised by Respondent should if anything encourage this Court to grant the writ and clarify an important area of federal law on which numerous other courts have written without the benefit of substantial guidance. After Justice Holmes initially set forth the *Davis v. Green* "furtherance of the enterprise" test, numerous courts have considered related questions in a variety of factual contexts. Their opinions have varied from straightforward adherence to the *Davis v. Green* rule[7] to actually questioning the continuing validity of that standard.[8] The Texas court in the case at bar managed to avoid entering the debate regarding the propriety and applicability of the *Davis v. Green* test, but its holding clearly constitutes a rejection of that

---

vent a practical joke. Instead, the plaintiff's supervisor supplied the plaintiff with the grease gun and directed him to use it. Thus, *Claris* at least involved a situation where the supervisor was performing an act ostensibly intended to further the railroad's enterprise—i.e., furnishing the grease gun—while fireman Calloway's conduct in placing the torpedoes for the purpose of perpetrating a practical joke was not "mixed" with any intent to perform a legitimate railroad function. *Mileski v. Long Island R.R.*, 499 F.2d 1169 (2d Cir. 1974), was neither a practical joke case nor a course and scope of employment case, but simply involved a negligent failure to furnish safety goggles.

7. *See, e.g., Sowards v. Chesapeake & O. Ry.*, 580 F.2d 713, 715 (4th Cir. 1978); *Copeland v. St. Louis-San Francisco Ry.*, 291 F.2d 119, 121 (10th Cir. 1961); *Sheaf v. Minneapolis, St. P. & S.S.M. R.R.*, 162 F.2d 110, 113 (8th Cir. 1947); *Hoyt v. Thompson*, 174 F.2d 284, 285 (7th Cir. 1949); *Blunk v. Achison, T. & S.F. Ry.*, 97 Cal. App. 2d 229, 217 P.2d 494, 497 (1950); *Osment v. Pitcairn*, 349 Mo. 137, 159 S.W.2d 666, 668 (1941), *cert. denied*, 317 U.S. 587 (1942) and 320 U.S. 792 (1943).

8. *See Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 172, n.8 (2d Cir. 1968); *cf. Baker v. Baltimore & O. R.R.*, 502 F.2d 638, 641-42, n.2 & 3 (6th Cir. 1974).

rule. Therefore, the Supreme Court should take this opportunity to correct the holding of the Court of Civil Appeals and enunciate the correct course and scope standard to be followed in FELA cases.

## II. FAILURE TO DISCIPLINE

In his Statement of the Case, Respondent uses the terms "torpedo misuse" and "rule violation" as if they were interchangeable. In fact, they are not. A "rule violation" occurs when a Missouri Pacific *employee* misuses a torpedo. But torpedo misuse can also result, and under the evidence frequently *did* result, from the conduct of outsiders. Thus, testimony that torpedoes had been heard to explode in the yards did not constitute evidence of torpedo misuse by Missouri Pacific employees. This crucial distinction renders inapplicable the single case relied upon by Respondent, *Descoteau v. Boston & Maine R.R.*, 140 A.2d 579 (N.H. 1958), in which the court's opinion details the extensive evidence of kerosene misuse *by employees* over a period of many years. *Id.* at 582-83. Because there was no such evidence in the case at bar, the holding in *Brooks v. Washington Terminal Company*, 593 F.2d 1285, 1289-90 (D.C. Cir.), *cert. denied*, 442 U.S. 910 (1979), controls:

> "Before failure to enforce a rule could give rise to liability, there must be evidence of prior disregard of the rule which would warrant a finding of the defendant's knowledge of the practice. . . ."

*See also Cuddy v. Western Maryland Ry.*, 229 F.Supp. 443, 445 (Md. P.A. 1963), *aff'd per curiam*, 332 F.2d 371 (3d Cir. 1964):

> "There was no evidence that the company knew or had reason to know that firearms were on the company's trains in violation of the rule. . . . [T]he plaintiff utterly failed to produce any evidence whatever of knowledge on the part of the defendant through its supervisory officers of the carrying of firearms by its employees on freight trains contrary to Rule 25(h). Under such circumstances there is no basis on which negligence could be imputed to this defendant. . . ."

*Cf. Atlantic Coastline R.R. v. Southwell,* 275 U.S. 64 (1927).

Contrary to the holdings of the above cases, Respondent would have this Court impose liability on the railroad for failure to discipline, notwithstanding the absence of any evidence that a Missouri Pacific officer had knowledge of a rule violation.[9] In the absence of such evidence, it is obviously impossible to impose discipline, for the very concept of discipline requires the identification of an employee who can be the subject thereof. Respondent cannot point to any evidence in the record that prior to this incident a Missouri Pacific employee misused a torpedo and was not disciplined for

---

9. Respondent's attempt to buttress his argument by referring to Mr. Darrington's excluded testimony of torpedo misuse is not availing because the proffered deposition testimony was not limited in time to the period prior to this incident. Thus, Mr. Darrington's testimony, even if the trial court had erroneously permitted the jury to hear it, would not have been evidence of torpedo misuse during the relevant period.

that conduct. Therefore, as a matter of law, there is no evidence of a negligent failure to discipline.

Respectfully submitted,

BEN G. SEWELL
900 Capital National Bank Bldg.
Houston, Texas 77002
(713) 652-8700

*Of Counsel:*

GORDON A. HOLLOWAY
CLAUDE R. TREECE
SEWELL & RIGGS
900 Capital National Bank Bldg.
Houston, Texas 77002
(713) 652-8700

## CERTIFICATE OF SERVICE

I, Ben G. Sewell, a member of the Bar of this Court, do hereby certify that on February _____, 1981, three (3) copies of the foregoing Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to J. Donald Bowen, counsel of record for Respondent, at 2800 Two Houston Center, 909 Fannin Street, Houston, Texas 77002.

BEN G. SEWELL